SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-903

EDWARD H. DYKE,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

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IN THE

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STATE OF GEORGIA,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

The Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of Georgia entered in the above case on September 24, 1974.

OPINION BELOW

The Opinion of the Supreme Court of Georgia is reported at ___ Ga. ____, 209 S.E. 2d 166 (1974), and is attached hereto as Appendix "A".

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on September 24, 1974. Mr. Justice Powell of this Court granted to Petitioner an extension to January 22, 1975, within which to file this Petition. This Court's jurisdiction is invoked under *Title 28 U.S.C. § 1257(3).*

QUESTIONS PRESENTED

1. Whether the trial court's improper instructing of the jury as to the law denied Petitioner his vested Constitutional rights guaranteed him by the *First, Fifth,* and *Fourteenth Amendments* to the *Constitution of the United States* and the *Constitution of the State of Georgia.*

2. Whether the trial court denied Petitioner a fair trial and due process of law by exhibitions of patent prejudict and interference with the presentation of Petitioner's defense.

3. Whether the Petitioner's right against self-incrimination has been violated by the introduction into evidence of an incriminating statement made by the Petitioner during an in-custody interrogation.

4. Whether the trial court erred in not suppressing from evidence the introduction of a motion picture film seized twice based on constitutionally insufficient affidavits.

5. Whether the Petitioner, by being charged, convicted, and sentenced for having committed two (2) crimes, when in fact there was but one (1) "single transaction" involved barring conviction and punishment for second count, was denied his right against Double Jeopardy.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the *First, Fourth, Fifth,* and *Fourteenth Amendments* to the *Constitution of the United States; Article I, Section I, Paragraphs III, VI, VIII, and XVI* of the *Constitution of the State of Georgia (Georgia Code Annotated §2-103, §2-106, §2-108* and *§2-116);* and *Georgia Code Annotated §§26-506, §26-2101,* appear in Appendix "B" hereto.

STATEMENT

1. The Petitioner was charged, by Information, that on October 24, 1973, he:

> did commit the offense of distributing obscene materials in violation of Georgia Code Section 26-2101 in that the said accused, did knowing the obscene nature thereof, exhibit a motion picture film entitled "The Devil in Miss Jones" that contained obscene and indecent scenes, which material considered as a whole and applying contemporary community standards predominantly appeals to the prurient interest, is a patently offensive depicition and description of sexual conduct embodying a shameful or morbid interest in nudity, sex and excretion, and goes substantially beyond customary limits of candor in describing or representing such matters; and said film taken as a whole lacks serious literary, artistic, political or

scientific value and is utterly without social redeeming value. The date alleged herein is an essential averment to this transaction.

2. Count Two of the Information, rendered the same day as Count One, above, charged the same offense in the same language, with the date of the offense alleged to be November 6, 1973. Count Two did not contain, as did Count One, the sentence that "the date alleged herein is an essential averment to this transaction".

3. The verdict of the jury was rendered on November 20, 1973, the Petitioner being found guilty of both counts. He was sentenced to twelve (12) months imprisonment and One Thousand Dollars ($1,000.00) fine on each count, with the sentences to run consecutively.

4. Various motions by Petitioner to exclude evidence, to dismiss, and for a new trial, and objections to the introduction of statements contrary to *Miranda v. Arizona*, 384 U.S. 436, and to the court's instructions, all of which raised Petitioner's constitutional rights under the *First, Fourth, Fifth,* and *Fourteenth Amendments,* were overruled by the trial court.

5. On September 24, 1974, the Supreme Court of Georgia affirmed the conviction (See Appendix "A").

REASONS FOR GRANTING THE WRIT

1. During testimony, the Court took it upon itself to instruct the jury on the law of obscenity:

"(The Court) That's exactly what I'm fixing to do here, and it's not my instruction to the Jury in general, it's one to define what they are trying here.

The Georgia Code states that a person commits the offense of distributing obscene material when he – using it in its restricted sense here – exhibits or otherwise disseminates – because that's the thing we're dealing with here, is the exhibiting of a film, to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent to do so, provided the word 'knowing' shall be deemed to be the actual or constructive knowledge of the obscene contents of the subject matter, and that they shall presun e that one has constructive knowledge of the material, contents – has knowledge of facts which would put a reasonable and prudent man on notice of the suspect nature of the material. The elements of the offense that is being tried here is the average person applying contemporary community standards – that is the contemporary community standards of the State of Georgia – would find that the motion picture, taken as a whole, appeals to the prurient interest in sex. That the motion picture charged must depict or describe categories of sexual conduct specifically defined by the statute in question. And that term, 'specifically defined', means – I'll get into that in a moment or two. The motion picture, taken as a whole, lacks serious literary, political, artistic, or scientific value. That, taken as a whole, it is utterly without redeeming social value. That the sexual conduct defined by the law must be depicted described, and presented in an offensive, patently offensive way, and that the defendant wilfully and intentionally committed the act – which the law I read to you forbids – and either offered to exhibit or did exhibit knowing the contents thereof, and that knowledge is derived by you from a reading of the statute of constructive knowledge, if you should find it to be constructive knowledge. Now, that's the issue we're trying. There will be other issues submitted and put in the Charge, but I want the Jury of course to be aware of that at all times, and I think the law does not

make any exception, does not qualify the statute. I will give you a full Charge on that, but I want you to keep in mind at all times those are the issues. You will be the determining factor in this case, and not some other witness. You'll take whatever legal testimony and apply it as you see fit, but the Jury will be the ultimate determining factor under the law and the decisions of the Supreme Court of the United States and of Georgia, and the statute of Georgia, which has put that in the hands of the Jury."

Thereafter, at the conclusion of all proof, the Court reinstructed the Jury on the law:

"(The Court) The law of Georgia, of which this Defendant is accused of having violated, is as follows: 'A person commits the offense of distributing obscene materials when he exhibits, or otherwise disseminates, to any persons any obscene material of any description knowing the obscene nature thereof, or who offers to do so, or who possesses such material with intent to do so, provided the word 'knowing' as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter, and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material. Material – and in this case that is the film – is obscene when considered as a whole, applying community standards, its predominant appeal is to prurient interest; that is, a shameful or morbid interest in nudity, sex, or excretion, and is utterly without redeeming social value, and if, in addition, it goes substantially beyond the customary limits of candor in describing or representing such matters.'

The Court charges you in this connection what is obscene material is determined by the sensibilities and

the moral standards of the people or community as a whole, and that is *the community of Georgia, as evolved from generation to generation along with our civiliation.* What is obscene in one period may not be obscene in another period of our civilization. Whether one commits a violation of the Georgia law, as heretofore given you in this Charge, depends upon the time, the place, the manner by which one exhibits or offers to do the same, or otherwise disseminates the alleged obscene material, and all of the circumstances surrounding the exhibition, or the offering of the exhibition of the same – in this case it's the film.

In determining whether the material predominantly appeals to a shameful and morbid interest in sex, excretion, or nudity, and whether the said material is patently offensive because it goes substantially beyond the customary limits of candor in describing or representing certain matters, you must consider what, *by general consensus of the community of Georgia, as a whole, would be offensive to the common instincts of decency of people generally.*

The Court charges you that the burden is upon the State to establish beyond a reasonable doubt that the material alleged to be obscene by the State in this accusation, must as a whole appeal predominantly to a prurient interest in sex, excretion or nudity; that is to say, that the predominant appeal of such material is to a shameful or morbid interest in sex, excretion, or nudity, and that the materials are patently offensive because they go substantially beyond the customary limits of candor in describing or representing such matters, and that the materials are utterly without social value. All of these elements must be present and united at the same time; they must coalesce and co-exist. A motion picture is not obscene merely because it depicts relationships which are contrary to your religious precepts, or the religious precepts of the community as a whole.

The Court, out of a sense of precaution, is going to again give you the essential elements of what this offense is.

First, that the average person – not a sick person, not a highly trained person, not a professional person dealing with it, but the average man and woman in the community, that constitutes the community of Georgia, applying contemporary community standards, would find that the motion picture charged, taken as a whole, appeals to the prurient interest in sex.

Second, the motion picture charged herein must depict or describe categories of sexual conduct specifically defined by the statute in question, *and the Court has already given you that.* And the specific categories of conduct defined by the statute *is if its* predominant appeal is to a prurient interest, and they define prurient interest as being a shameful or morbid interest in nudity, sex, or excretion. Further, that the motion picture we're trying here, taken as a whole, lacks serious literary, artistic, political or scientific value, *or* that the film is totally or utterly without redeeming social value, and that the film depicts the sexual conduct of nudity or excretion in a patently offensive way. Of course, that the Defendant did the act with knowledge, and that Court has charged you that knowledge should be the knowledge of a prudent person, whether he knew it actually or should have known it, constructive knowledge, that a prudent person under the facts and circumstances, as given by the witness here, should have known of the nature of the film being exhibited that it was obscene and he intended to exhibit the film. You have to find that beyond a reasonable doubt. That he intended to exhibit the film, or that he aided, counseled, abetted, or participated in the exhibition of the film, or the intent to exhibit it, with the knowledge of its contents

> – with the knowledge that its contents were obscene within the definition of obscenity under Georgia law, *or* that he, as a reasonable, prudent man, considering the circumstances, should have known."

Later, the Court instructed the Jury on the law of obscenity once again:

> "(The Court) It would be necessary, before this Jury would be authorized to convict this Defendant that you find that this film was obscene, and in making that determination you must apply these guidelines. Applying contemporary community standards, considering the material – that is the film – as a whole, the average person, the average person in Georgia would find that its predominant appeal was to a prurient interest in sex; that the film or material is patently offensive depiction of sexual conduct *embodying shameful or morbid interest in nudity, sex, or excretion,* and goes substantially beyond the customary limits of candor in describing or representing such matters.
>
> That material, that is the film, taken as a whole, lacks any literary, artistic, political, or scientific value. That the film taken as a whole, is utterly without redeeming social value." (emphasis supplied)

As is apparent from reading the above, the Court charged the Jury no less than four (4) times on the law of obscenity changing the instruction each time. It is encument upon the trial court to properly instruct the Jury as to the law. In a criminal prosecution, especially one involving the issue of the *First Amendment* to the *Constitution of the United States* and the narrow exclusion of "obscenity" from the protection of that Amendment, the Court *must* be articulate and precise to

protect the rights of the defendant as well as preserve free speech and press. With a well-known film at issue, as is the case herein, the Jury must be fully enlightened as to that "narrow" area of unprotected speech in order to intelligently pass upon the issue of obscenity and the issue of the guilt of the defendant. As Mr. Chief Justice Burger wrote in *Miller v. California*, 413 U.S. 15 at 23:

> "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment. *Kois v. Wisconsin*, 408 U.S. 229 (1972); *United States v. Reidel*, 402 U.S., at 354; *Roth v. United States, supra*, at 485. [footnote omitted]. 'The First and Fourteenth Amendments have never been treated as absolutes [footnote omitted].' *Breard v. Alexandria*, 341 U.S., at 642, and cases cited. See *Times Film Corp. v. Chicago*, 365 U.S. 43, 47-50 (1961); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S., at 502. We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See *Interstate Circuit, Inc. v. Dallas, supra*, at 682-685. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed [footnote omitted]. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."

Considering the entire charge, as we must, the trial court instructed the Jury improperly; confused the jurors by its

instructions; inserted argumentative statements (see quoted instruction with emphasis supplied); refused to further define the issue of "shameful or morbid" as requested by Defense Counsel; all of which prevented the Jury from intelligently passing upon the Petitioner's guilt and further denied Petitioner a fair trial. Thus, the Trial Court instructed the Jury no less than four (4) times on the law of obscenity, each instruction differing from the other, containing argumentative references and undefined words of art. It is clear that a reading of the instructions will show that they are improper, confusing, and conflicting.

Charges must be read as a whole, and if they are calculated or become confusing and imperceptible to a Jury, then the Judgment must be reversed.

> Even though the subsequent portion of the charge was a correct statement of the law, "the court should not give conflicting rules of law in charge and leave the Jury to choose between them; where an erroneous statement is made it is not cured by a correct statement in another portion of the charge unless the Jury's attention is called to the correction by a retraction of the erroneous statement or in some other like manner."

Cameron v. State, 123 Ga. App. 282, 180 S.E.2d 554 (1971) quoting *Wilson v. State*, 215 Ga. 672, 675, 113 S.E.2d 95, 98. See, *Srochi v, Kamensky*, 121 Ga. App. 518, 174 S.E.2d 263 (1970); *United States v. Bagby*, 451 F.2d 920 (9th Cir. 1971); *United States v. Harvey*, 428 F.2d 782 (9th Cir. 1970); *Perkins v. United States*, 315 F.2d 120 (9th Cir. 1963).

In *Perez v. United States*, 297 F.2d 12 (CA-5 1961), the Court of Appeals for the Fifth Circuit said:

> It is also fundamental to our jurisprudence that instructions to the jury must be consistent with each other, and not misleading to the jurors. Smith v. United States, 230 F.2d 935 (6th Cir. 1956)[6]. The fact that one instruction is correct does not cure the error in giving another that is inconsistent with it . . .
>
> [Footnote 6] A jury of one's peers "is supposed to safeguard our institution of fair trial by insuring impartiality. But of what value is an open mind, if it does not know, with clear delineation, the issues upon which it is to pass judgment?" William v. United States, 131 F.2d 21, 23 (D.C. Circ. 1942).

297 F.2d at 16. See also *Mann v. United States*, 319 F.2d 404, 410 (CA-5 1963) where the Court said, "Instructions to the jury must be consistent and not misleading. The fact that one instruction is correct does not cure error in giving another inconsistent one." What these cases say is that errors such as the ones at Bar go to the very essence of the case, and thus require reversal. See also *United States v. Apollo*, 476 F.2d 156 (5th Cir. 1973).

The inconsistent, misleading and erroneous charge was further compounded by the charge's repetitiousness. "Instructions should be as succinct, clear and consistent as possible given their intended function and the nature of the particular case . . . Unnecessarily long and repetitive instructions increase the danger that the jury will perceive inconsistencies, become confused, and be unduly impeded in properly exercising its functions . . . Under some conditions the repetition of particular instructions might have a tendency to

force a verdict against an Accused by unduly underscoring certain aspects of the case." *United States v. McCracken*, 488 F.2d 406, 414 (CA-5 1974). See *Lacaze v. United States*, 391 F.2d 516 (5th Cir. 1968).

In *Chalker v. State*, 99 Ga. App. 278, 108 S.E.2d 178, 179 (1959), the Court said:

> Where the court in its charge to the jury stated a correct principle of law and thereafter in connection with the same matter stated an incorrect principle of law and nowhere in the charge instructed the jury as to the application of the conflicting principles so that the jury was left to pick and choose between the incorrect principle and the correct principle, an assignment of error on the incorrect portion of the charge is meritorious.

See also, *George v. State*, 103 Ga. App. 598, 120 S.E.2d 55 (1961). And in *Maddox v. State*, 99 Ga. App. 438, 108 S.E.2d 758, 760 (1959) the Court said:

> An erroneous instruction is not cured by a subsequent correct instruction to the jury unless the court expressly withdraws the erroneous instruction . . . and a charge which contains two distinct and conflicting propositions of law . . . is calculated to leave the jury in such a confused condition of mind that it cannot render an intelligible verdict.

It is well-known general principle of law that where there are two instructions to a jury, one erroneous and prejudicial, and the other correct, then it is impossible to tell which one the jury followed, and it amounts to reversible error. *See Mills v. United States*, 164 U.S. 644 (1897); *United States v. Jacobs*,

475 F.2d 270 (2nd Cir. 1973), *cert. denied*, 414 U.S. 871; *Nicola v. United States*, 72 F.2d 780 (3rd Cir. 1934).

Additionally, the Court's instruction shifted the burden of proof from the State to the Petitioner. The Court in *Mann v. United States, supra*, at 410 said:

> As stated in Block: "The error of the trial court is . . . fundamental and goes to the very essence of the case so we must under the rule take notice of it." As emphasized in *Perez*, it is never permissible to leave the jury with the idea that it becomes the duty of the defendant to establish his innocence. The charge in this case could very well have had that effect, and as such, we cannot allow the conviction to stand.

See *Cupp v. Naughten*, 414 U.S. 141 (1973). See also *United States v. Driscoll*, 454 F.2d 792 (CA-5 1972) and *United States v. Wilkinson*, 460 F.2d 725 (CA-5 1972). That the error involved in such a shifting of burden is highly prejudicial was made clear by the Court of Appeals for the Fifth Circuit:

> This Court recognizes that a criminal defendant is not entitled to a perfect trial under our Constitution. Lutwak v. United States, 344 U.S. 604, 73 S. Ct. 481, 97 L.Ed. 593 (1953). Habeas corpus will not lie to challenge a jury charge in the absence of a clear denial of due process so as to render the trial fundamentally unfair. Higgins v. Wainwright, 5th Cir. 1970, 424 F.2d 177; McDonald v. Sheriff of Palm Beach County, Florida, 5th Cir. 1970, 422 F.2d 839. In light of these principles, *there is yet no doubt that a shift in the burden of proof of an essential element of the crime does rise to constitutional proportions and renders the trial fundamentally unfair.* The presumption of innocence and the harsh burden of proof placed on the State in criminal prosecutions are two of the oldest and

> most fundamental rights protected by our Constitution. See., e.g., Coffin v. United States, 156 U.S. 432, 15 S. Ct. 394, 39 L. Ed. 481 (1895). They purport to protect all citizens from the threat of punishment by mistake. They are therefore far too important and fundamental to be classified as less than constitutionally protected. See Deutch v. United States, 367 U.S. 456, 81 S.Ct. 1587, 6 L.Ed.2d 963 (1961); Speiser v. Randall, 357 U.S. 513, 78 S. Ct. 1332, 2 L.Ed.2d 1460 (1958); Morrison v. California, 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed. 664 (1934); Cummings v. Missouri, 4 Wall. 277, 18 L.Ed. 356 (1866).

Smith v. Smith, 454 F.2d 572, 579 (CA-5 1971), cert. denied, 409 U.S. 885 (emphasis supplied). See also, *George v. State*, 103 Ga. App. 598, 120 S.E.2d 55 (1961).

Therefore, as the issue of obscenity is the very essence of this case, and as this Court in *Miller v. California*, 413 U.S. 15, reiterated the principle that regulation of such material must be done with the utmost precision so as not to preclude the exercise of non-obscene free speech, then the instructions below are clearly erroneous, misleading, confusing, and prejudicial, and the conviction herein must be reversed. See *Bollenbach v. United States*, 326 U.S. 607 (1946).

2. The Trial Court in the instant case caused the trial of the Petitioner to be a travesty of Justice. During the defense of this case, the Court, on numerous occasions, as will be pointed out, interjected itself, both in and out of the presence of the Jury, by being argumentative with Counsel and the Defense witness, accusing Counsel of attempting to mislead the Court and the Jury, interposing unfounded objections for the State, all of which demonstrated the Court's prejudice and thereby denied Petitioner a fair trial.

Petitioner called J. Frank Clark, a highly educated and well respected psychologist, to testify for his defense, one of the issues in the trial being obscenity. Due Process of Law requires that the Defense be permitted to call witnesses. *Smith v. California*, 361 U.S. 147 (1959); *Kaplan v. California*, 413 U.S. 115 (1973).

While Dr. Clark was relating his qualifications to the Jury, the Solicitor interjected "We'll stipulate he's a clinical psychologist, and he has qualifications to be one." Defense Counsel then questioned the import of the stipulation by asking whether the State was "accepting the Doctor on the opinions offered in Court today?"

> "(The Court) No, they wouldn't be doing that. Nobody stipulates that. They are trying to stipulate that he is a – can render an opinion based on his professional expertise in this particular field. Now, to say what you say would be admitting things. They don't ever admit the testimony. That's a matter for the Jury to determine, to weigh and evaluate, and when you respond in that manner, Mr. Deitch, it can so easily mislead a jury."

At the request of Defense Counsel, the Jury was excused and the Court then stated its position that it understood that Counsel was requesting a stipulation to the "ultimate" matter at issue, to-wit: obscenity. There is no indication that Defense Counsel ever intended to propound such a question to the witness, Counsel being fully aware such is solely within the province of the Jury; however, the underlying constitutional criteria are relevant for the Jury's consideration and, as the record reflects, were testified to by the witness, albeit under adverse conditions created by the Court.

The Court then, out of the presence of the Jury, improperly accused Defense Counsel of attempting "to get matters to the Jury that otherwise couldn't go in under the rules of an expert. That's what this is about, and the Court knows it."

The State objected to potential testimony about the psychiatric group in San Francisco which distributed sexually explicit films. In the presence of the Jury:

> "(The Court) Let me ask you. I, of course, am in complete ignorance, some of you young lawyers know more, but I always understood that you couldn't go into specific details in a matter of this kind in asking certain questions, qualifications, or that you couldn't take the details any more than you can go into details – If you put a person's character in issue you cannot go into the specific details by getting someone up to say that Joe Blow at a certain time had an opportunity to steal a thousand dollars but he didn't take it. That wouldn't be relevant. Now, the point that the Court's trying to make is that it seems that the question you're asking is to get in details and specifics that would require us to try some other type of matter here.
>
> Now, what is the purpose of talking about some place out in San Francisco?
>
> (Mr. Deitch) Your Honor, the witness testified –
>
> (The Court) I understood what he testified.
>
> (Mr. Deitch) May I finish, Your Honor? May we be heard outside the presence of the Jury?
>
> (The Court) You all go right on, they've heard part of it; I want to know. Proceed."

When asked where the witness obtained films in California, the following transpired:

> (The Witness) Well, there are several sources. One is from Wide Publications, which is a church group, church-related group in San Francisco. Second source in San Francisco is Multi-Media Films –
>
> (Mr. Moran) Your Honor, I object to the answer he's given, it's not in response to the question.
>
> (The Court) I'm going to sustain that.
>
> (Mr. Deitch) May we be heard outside the presence of the Jury?
>
> (The Court) Yes, let the Jury go to their room, please.
>
> (whereupon the Jury retired to the Jury Room)
>
> (The Court) Now, I want to direct you to this. In the first place he says some films; nobody knows that kind of films they are. He's talked about books. It's so general in its nature that I think that we're getting way out here, unnecessarily prolonging the case by long and extended cross examination, long and extended types of evidence here that have no relevancy here in this matter at all."

There was *no* testimony about "some films" or "books". Another attempt by the Court to muddy the water and impede a fair trial. At page 80 of the Transcript, the Court admonishes Defense Counsel and accuses him of "a sly method" of introducing testimony; then the Court concludes apparently talking about sanctions against Counsel "in these type cases", obviously obscenity cases.

At page 82 of the Transcript, the following transpired:

(Mr. Deitch) Have you had an opportunity, through your practice and through your education, to observe or see the response of your patients and others through the reading of data or research with regard to the sexually explicit material?

(Mr. Moran) I object to that, Your Honor, the question in issue is not the impact of this film on the public but whether it's legally obscene. That question opens the door to everything in the world. It's based on the premise of using the reaction of people who need treatment, medical treatment, to these particular films, and that's not the point here. This film was showing in downtown Atlanta to any individual who walked in there, without any medical guidance whatsoever, and I object to it on those grounds.

(The Court) What do you say to that?

(Mr. Deitch) Your Honor, the test is whether or not the material appeals to a shameful or morbid interest of the average person.

(The Court) And the community of Georgia, having the average person of a civilization that's been built up over thousands of years as to what is and what is not obscenity, and use the specific term, describe it specifically as the statute describes it. I think this objection is good. I am compelled to sustain his objection, and I'm going to sustain it.

(Mr. Deitch) Yes, Your Honor.

Q. Doctor, have you read any articles in your practice, in your profession, of other professionals, other psychological field regarding the effect of erotica upon the viewer?

(Mr. Moran) I object, Your Honor. Under the laws of the United States, set down six months ago by the United States Supreme Court, and very recently by our Supreme Court, whether these have any effect on individuals is not in issue. It is a legal matter to be determined by this Jury in this Court, and it's totally irrelevant. I also object on the grounds that he hasn't limited it to this particular film that was shown in this particular county by this particular man. That any film or anything else, or any marriage manual that may have come up –

(The Court) I think that the issue we're trying here, among other essential elements, will be what the Georgia Statute proscribes that makes it a violation of the law. And the elements, and I'll take it from something that you have furnished me, and I think the Jury should be conscious at all times that that's what they are trying, is that –

(Mr. Deitch) Your Honor, may we be heard out of the presence of the Jury?

(The Court) No, sir, I think, since you've done your talking here with the Jury here the Jury should hear this part of it. The Court, when it thinks the Jury should be well aware of the thing they are trying, that they can be stopped in the middle of the evidence and told what the law is. Do you differ with that statement, sir?"

Uninvited, the Court then instructed the Jury on the law – during the proof.

At page 88 of the Transcript:

"(The Court) Mr. Moran, are you going to permit him to ask these questions, and let the witness define what the word means?

(Mr. Moran) Your Honor, I was going –

(The Court) I think the Court has an overriding duty to tell you to disregard any information that he's imparted with the restricted area to it, what prurient means, for the reason that regardless of what you may think, or what anyone else may thing, what I may think, or the doctor may think that it so happens that the Georgia Legislature has defined this term, and material is obscene if considered as a whole, applying contemporary community standards, its predominant appeal is to the prurient interest; that is, a shameful or morbid interest in nudity, sex, or excretion. Now, you can disregard his answer, what his understanding of it is, because he very frankly stated it's a legal term, and it is a legal term, and I'm not in any way reflecting on him; I'm just stating that this is a term that you'll have to take from the statute itself in conjunction with other evidence.

Now, you may proceed, Doctor."

At page 90 of the Transcript, Defense Counsel asked the following question:

"Now, I'll ask you this question. Do you have an opinion sir, based upon your education, your professional career, your conferences with colleagues, your lectures, your clinical practice, empirical data traditionally relied upon [by] you (sic) in the pursuit of your professional career, whether or not the motion picture film "The Devil in Miss Jones", applying contemporary community standards, and considering the material, or film, as a whole, not part by part, was – whether the average person would find that it's, that is, "The Devil in Miss Jones", predominant appeal is to a prurient, the term the Judge defined for you, interest in sex?"

The Court interposed:

"All right, don't answer that question. Do you have any objection?

(Mr. Moran) Object to it, Your Honor. He hasn't laid the proper foundation.

(The Court) I sustain it on the basis that you haven't laid the proper foundation."

Counsel then asked, "Doctor, have you read extensively in the area of –", the Court once again intruding, "Just a moment. You've misunderstood this ruling. I don't want to cripple him in any way. Let the Jury go to their room. *Let me tell him (*the Solicitor*) why he made the objection."* The Court then engaged in a lengthy monologue filled with non-sensical verbiage.

At page 93 of the Transcript:

(Mr. Deitch) Do you, Doctor, consider the average person in our society to have some sexual dysfunction?

(Witness) Masters and Johnson–

(Mr. Moran) I object to that, Your Honor.

(The Court) I sustain that objection, of course. His answer was not in response to your question and it was going into specifics, talking about one group of people. We could probably sit here all day and have one group saying one thing and another group saying something else, couldn't we? That would not be admissible in this."

At page 96, after the Jury was sent out, the Court once again accuse Defense Counsel of asking improper questions. Upon the Jury's return the Court said:

"The question that he asked the witness did not respond to it. The witness was making a specific answer. Now, the Jury, if they heard anything with respect to the last question about any individuals; what he's done with respect to individual patients of his, I'm going to rule it out and ask you to completely disregard any reference to it.

I'm going to ask you, Mr. Witness, to listen to the question and respond to the question.

Now, Mr. Moran, I'm going to ask you, sir, if you have objections, please make the objection at the termination of the question before the witness has had an opportunity to answer the question.

All right, proceed."

The Court then admonished the witness for attempted "wrangling".

When the witness was asked for an opinion about the motion picture film and whether it appeals to the prurient interest of the average person, the following transpired.

"(The Witness) Yes, I do have an opinion.

(Mr. Deitch) And what is your opinion, Doctor?

(The Witness) My opinion is that it does not appeal to the prurient interest.

(Mr. Deitch) And, Doctor, what do you base your opinion on?

(The Witness) The average reaction to sexually explicit material is sexual arousal for a short period of

time, ten minutes, fifteen minutes. Fifty-four percent of men are aroused by sexually explicit material. Approximately twenty-five percent of the people are totally repulsed, and feel that this material is just very ugly, shameful, disgusting. Another approximately twenty-five percent are relatively neutral with regard to sexually explicit films. These films come from a study by Schmidt and –

(Mr. Moran) Objection, Your Honor.

(The Court) What are you objecting to, sir?

(Mr. Moran) When he starts going into what the studies of somebody else are, that's specifics.

(The Court) I sustain the objection to that. You asked him for his opinion, didn't you?

(Mr. Deitch) Why his opinion was what it was and what it was based upon.

(The Court) Let the Jury go out just a moment.

(Whereupon the Jury retired to the Jury Room)

(The Court) Now, just a moment. Miss Reporter, read back his last question.

(While the Reporter was searching the record colloquoy continued between Court and Counsel)

(The Court) If we permit this in a trial you'd never be able to get the facts in issue that the law prescribes, and you'd never get through the trial.

Bring the Jury in.

(Whereupon the Jury returned to the Jury Box)

(The Court) Ladies and Gentlemen of the Jury, the question he asked the Doctor, and the Doctor attempted to make an answer by stating a certain percentage of people reacted certain ways to certain explicit materials; that the Court has sustained an objection to. That's not relevant evidence in this case, and you should disregard any statement this witness made with respect to any percentages or statistics that he gave and stated to be a fact in this case. Don't ask that question any more. It's ruled out. You are totally to disregard it."

Counsel then proceeds to another criteria, asking:

"Now, Doctor, based upon, once again, your education, your clinical practice, your having read –

(The Court) Are you repeating a question you previously asked? You said 'once again.' Are you doing that?

(Mr. Deitch) No, Your Honor, I'm referring to other issues.

(The Court) All right, then. You said 'once again', and you have repeated and I've asked you not to keep repeating questions. Proceed."

The Court's interruption was unfounded and the Court was obviously playing with words, attempting to disrupt the Defense of the case, showing the Jury his prejuduce. The witness, after testifying the motion picture film has educational value, was next asked:

"The answer you gave in your opinion, would you limit that for using such films or depictions to a clinical atmosphere, or would it not be qualified and would it be proper for the average adult in our society without benefit of your counselling?"

and the following transpired:

(Mr. Moran) I object to it, Your Honor.

(The Court) What's your objection?

(Mr. Moran) It's irrelevant whether he would agree that the average adult or anybody could walk in there. He hasn't laid the proper foundation, that he knows what the average adult is.

(The Court) I'm going to sustain the objection because I think the breadth of your objection encompasses certain words he used in asking the question, even though you haven't pinpointed it. But it does encompass it, and for that reason – You limited it to somebody who would be his patient so I don't think that would –

(Mr. Deitch) Doctor, do you have an opinion whether the motion picture film "The Devil in Miss Jones" would have social value only to those –

(The Court) Now, wait just a moment. I'm not opening the door here for you to proliferate other questions. The nature of your question limited it to his patients only, Mr. Attorney, is what I stated. Now, for you to back up on that one and take off here on some other flights I'm not going to permit it."

On cross-examination the Solicitor asked:

"Do you mean to tell this Jury, when you said that this particular film, "The Devil in Miss Jones", would teach couples how to make love, that you were advocating the use of fruit in women's sexual organs, group sexual activities, the use of the anus excretion, as proper sexual activities in this community?"

Then the following transpired:

(Mr. Deitch) Objection, Your Honor, he didn't say what love making was, and I think that's an unfair question of this witness.

(The Court) I overrule the objection. He's testing the witness. He's got him on cross examination to get his reactions. After all, *the Jury is going to sit in judgment on the witnesses as well as the facts in this case.'* '(Emphasis supplied)

Then, at page 119, came the Court's finale and piece de resistance:

(Mr. Moran) Now, Doctor, do you know what the term 'patently offensive' means in every day language?

(The Witness) Yes, I think I do.

(Mr. Moran) Do you mean to tell this Court and this Jury that the depictions of sexual activity portrayed in that movie were not offensive?

(Mr. Deitch) Your Honor, I'm going to have to object. Of course the law is that when it's a matter of dissemination voiced upon the unwilling –

(The Court) Wait just a minute. *The law is not that.* If you are going to quote the law –

(Mr. Deitch) May we be heard?

(The Court) I'm not going to let you be heard on that question for this reason, sir. I've read this decision, I've read the other decisions, and that door so far as I'm concerned has been closed at the trial court level, and you keep alluding to it. *You have misquoted what the last decision states, in this courtroom in the presence of this Jury, and the Court doesn't think that's proper, and I'm not going to hear you make an argument here about something that has been adjudicated here.*

(Mr. Deitch) Your Honor, may I be heard outside the presence of the Jury?

(The Court) I'll let you be heard outside the presence of the Jury, yes, sir, on that question.

Let the Jury go to their room.

(Whereupon the Jury retired to the Jury Room)

(The Court) Now, what do you wish to say about it, sir?

(Mr. Deitch) Your Honor, it is the Defense's contention that patently offensive is in part or in total a matter of dissemination, and I would point out and rely on Miller versus California, June 21, 1973, where the Supreme Court of the United States –

(The Court) *I agree with that, that patently offensive does have reference to the time and place and manner of dissemination. Yes.*

(Mr. Deitch) And Mr. Moran did not qualify his question about where and what context the film was shown, merely that these sexual acts were patently offensive. We're arguing to the Court that it is in this context –

(The Court) *What was your statement I took exception to?* The statement you made. You've hedged your statement now, see. I want to go back to the statement you made here, and no doubt *not for my benefit but to get to this Jury certain things that could not be gotten to the Jury from the witness stand. That's the thing this Court frowns upon.* I agree with you that the statement you've just made as to what the law is is part of this law as expressed in another case.

I want to say another thing. Mr. Moran, of course, some of your questions were objectionable; he didn't object on that basis and he probably had reasons for it. Some of them actually were a little immature.

Let the Jury come out, I think I've said enough.

(Mr. Moran) I'll accept that." (emphasis supplied)

It is difficult for Counsel to conceive of a more connivingly calculating attempt by a trial court to interlope to the trial of the instant cause and to persuade the Jury, and more important, the system of criminal justice. The Canons of Judicial Ethics, more particulary Canon 15, adopted by the Georgia Supreme Court in 1965, have been violated by the trial court. See 220 Ga. 922, 923. See also *Wilson v. State*, 229 Ga. 224 at 225 (1972); *Dunn v. State*, 123 Ga. App. 607 (1971); *State v. Johnson*, 208 S.E. 2d 409 (N.C. 1974).

The Court was also being argumentative for the sake of being argumentative, to the detriment of the Petitioner, and for these reasons, *inter alia*, a *fair* trial was not afforded Petitioner.

The Court consistently interfered with the testimony of Dr. Clark, an eminent psychologist and the Defense's expert witness. Defense Counsel was accused of seeking the witness' opinion as to the ultimate question, i.e., obscenity, when only the testifiable elements thereto were sought. The Court sustained objections to questions because proper foundations were allegedly not made, yet it was the Court itself through the repeated hampering of Counsel that hindered the presentation of a proper foundation. This Court in *Miller v. California*, 413 U.S. 15, explicitly permits the use of expert witnesses by the Defense, yet this right was subtly destroyed by the Court's interference.

As the excerpted portions of the transcript show, the Court wove its opinion into the trial by tone of voice, innuendo, play-on-words, chastising of Counsel, and grandiose statements of its knowledge of the law; then, when the Jury would be sent out, the Court would contradict what it said in front of the Jury. Though not always clear and evident at the time, a review of the entire record shows a multitude of statements and actions by the Court that intimated to the Jury the Court's opinions of the facts, the witnesses, and the Defense Counsel. Counsel himself made every effort to ask the Court for discussions outside the presence of the Jury to minimize prejudicial effects. Generally, objections are necessary to argument of Counsel and possibly the Court where they are readily ascertainable; however, in the instant case, the transcript must be read in its entirety in that the Court was quite subtle in its approach and Counsel did not sit by and watch an obvious

injustice being carried out hoping to obtain a favorable result, without objections, and then complain on appeal. Here Counsel, as an officer of the Court, attempted to carry the trial from commencement to completion, attempting to rectify the Court's rulings out of the presence of the Jury, but at one point in the trial, the Court did not even allow the Court Reporter to read back a question of Counsel while the Jury was out of the courtroom. The Court violated the Canons of Judicial Ethics by being partial as is reflected in the entire transcript.

Remarks by the Court which tend to prejudice jurors or disparage a defense call for a reversal. As the Court in *Lincoln Life Insurance Co. of Georgia v. Anderson,* 109 Ga. App. 238, 136 S.E.2d 1, said, "A prejudicial remark by the court tending to disparage or belittle a defense, even though lightly made, is reversible error if the jury could interpret it as minimizing the defense." And in *Smallwood v. State,* 95 Ga. App. 766, 98 S.E.2d 602, the Court said, "It is not, however, for the court to make any remark which would seem to reflect upon or slut over the merits of a defense."

The actions of the Court created a manifest injustice, and the Court's actions, demeanor, and conduct of the trial as thus reviewable by this Court. Serious and manifest errors do not require objections, and are reviewable if the dignity of the courts, judicial process, and Justice is to be upheld. See *Feutralle v. United States,* 209 F.2d 159 (CA-5 1954). This is especially so where, as here, there were no "remarks" *per se* to be objected to, but a continuous insinuation of the Court's opinions and prejudices into this trial by means subtle and covert.

"Within its perogative, the jury must remain as free from any possible influence or coercion, even though unintended, as the trial judge would require that he himself be when sitting as a trier of fact." *Cook v. United States*, 254 F.2d 871, 875 (CA-5 1958). Where the Court's actions, influences, demeanor, and conduct of trial go to the very heart of the defense – the very essence of the issue to be permitted – obscenity, then those actions are plain errors that have affected the substantial rights of the Petitioner to a fair trial, and such errors are thus reversible, if a serious and manifest miscarriage of Justice is to be averted. *Fowler v. United States*, 242 F.2d 860, 863 (CA-5 1957). See also, *Garner v. Young*, 214 Ga. 109, 103 S.E.2d 302 (1958).

"The judge, in discussing with counsel the admissibility of testimony . . . or similar matters in the progress of the trial, or in explaining his rulings upon questions of his nature . . ." commits reversible error when he goes "out of the line of legitimate discussion upon the point presented or use[s] such language as to indicate apparent or actual judicial approval or disparagement of any witness or of any part of the testimony." *Peters v. State*, 72 Ga. App. 157, 33 S.E.2d 454. See, *Miller v. State*, 122 Ga. App. 553 (1970); *Wilson v. State*, 229 Ga. 224 (1972); *Dunn v. State*, 123 Ga. App. 607, 182 S.E.2d 317 (1971).

As this Court said in *Quercia v. United States*, 289 U.S. 466, 470 (1933), "The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling'." See *United States v. Williams*, 473 F.2d 507 (5th Cir. 1973). A judge must, in his interventions, be timely, and they must be designed to prevent misunderstanding, and not be

prejudicial. He must remember to keep judicial and prosecutorial functions separate, and display an attitude of impartiality. See *United States v. Jacquillon*, 469 F.2d 380 (5th Cir. 1972), *cert. denied*, 410 U.S.938.

The disparagement and intimidation of a defense may well, as here, rise to constitutional levels, and thereby deprive a person of a fair trial and due process of law. *See, e.g., United States v. Boatner*, 478 F.2d 737 (2nd Cir. 1973) ("evenhandedness" of judge here overcame questions of prejudice). *See also, United States v. Cismeros*, 491 F.2d 1068 (5th Cir. 1974); *United States v. Weiss*, 491 F.2d 460 (2nd Cir. 1974).

Such errors denied Petitioner a fair trial, and as such they are a serious miscarriage of Justice and rise to a constitutional level. The conviction must be set aside. *Rivers v. United States*, 400 F.2d 935 (CA-5 1968); *Landers v. United States*, 304 F.2d 577 (CA-5 1962); *Fowler v. United States*, 242 F.2d 860 (CA-5 1957); *Dunn v. State*, 123 Ga. App. 607, 182 S.E.2d 317 (1971).

3. The only evidence proffered by the State to prove Petitioner's scienter or *mens rea* was the testimony of Ira W. Brown, who testified that the Petitioner was behind a concession counter and that he said he was the manager. The testimony reveals that Petitioner was "in custody" even though he had not been removed to jail. The inquiry had focused on him, his freedom of movement was negated by three (3) law enforcement officers and the question propounded to him was designed to elicit an incriminatory admission (the State made no other investigation and offered no other proof).

Under the law of the land established in *Miranda v. Arizona,* 384 U.S. 436 (1966), Ira W. Brown and the other two (2) law enforcement officers violated Petitioner's constitutional privilege against self-incrimination by commencing an "in-custody" interrogation prior to advising him that he had a right to remain silent, that anything he said might be used against him in a court of law, that he had a right to an attorney and that if he could not afford an attorney, the Court would appoint him an attorney. Notwithstanding this prerequisite, Ira W. Brown delved into improper questioning of the Petitioner. Unlike the fact situation in *Wilburn v. State,* 230 Ga. 675 (1973) and *Williams v. State,* 202 S.E.2d 433 (1973), the investigation had focused on the Petitioner and the evidence *was* obtained as a result of interrogation. In *United States v. Castellana,* 488 F.2d 65 (CA-5 1974), the Court held:

> "*Miranda* warnings must precede 'custodial interrogation'. *Miranda v. Arizona,* 1966, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. To justify the absence of warnings here the Government claims first that Castellana was not in custody, and second that Agent Arwine's questions did not constitute interrogation."
>
> "The *Miranda* opinion declared that the warnings were required when the person being interrogated was 'in custody at the station *or otherwise deprived of his freedom of action in any significant way.' Orozco v. Texas,* 1969, 394 U.S. 324, 327, 89 S.Ct. 1095, 1097, 22 L.Ed.2d 311. The warnings' purpose is to dispel the compulsion inherent in custodial surroundings."
>
> * * * * *
>
> "Even if the questions had had a legitimate security purpose, we believe for several reasons that *Miranda*

warnings should have preceded them. First, such questions can be of only limited security value. If a detainer is truly dangerous, it is unlikely that he will reveal the location of weapons essential to his own security. Second, it would be difficult to define what is a 'security' or 'safety' inquiry, as opposed to an 'evidentiary' inquiry. If the response can be used in evidence against the detainer, then to some extent he is being asked to incriminate himself – precisely the danger *Miranda* seeks to avoid. Third, under existing authority the police may take direct action and search a suspicious, dangerous detainer. *Terry v. Ohio*, 1968, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. Such a search would seem to provide much better protection than mere questioning.

In sum, we feel that a 'security' exception to *Miranda* would erode that doctrine measurably without providing substantially greater protection for the police.'

In this Court's most recent announcement concerning *Miranda* rights, *Michigan v. Tucker*, _____U.S._____, 41 L.Ed.2d 182 (1974), this Court reiterated such requirements for compulsion of testimony to obtain incriminating evidence from an individual in violation of his privilege against self-incrimination.

"In more recent years this concern – that compelled disclosures might be used against a person at a later criminal trial – has been extended to cases involving police interrogation.'

. . .

" . . .It was not until this Court's decision in *Miranda* that the privilege against compulsory self-incrimination

> was seen as a principal protection for a person facing police interrogation. This privilege had been made applicable to the state in *Malloy v. Hogan*, 378 U.S. 1 (1964), and was thought to offer a more comprehensive and less subjective protection than the doctrine of previous cases. In *Miranda* the court examined the facts of four (4) separate cases and stated: 'In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious *Fifth Amendment* rights is, of course, not lessened in the slightest .... To be sure, the records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.' 384 U.S., at 457"

_____U.S._____, 41 L.Ed.2d at 191-192.

This Court, speaking through Mr. Justice Rehnquist, noted that statements of the accused under such circumstances must be excluded from evidence, citing *Johnson v. New Jersey*, 384 U.S. 719 (1966).

The Georgia Court of Appeals, in *Carnes v. State*, 15 Ga. App. 387 (1967), held:

> "It is certainly true that the Supreme Court of the United States in recent decisions has made it clear that it will protect the rights against self-incrimination of citizens taken into custody *or otherwise restrained who are suspected or accused of crime.*" (emphasis supplied)

In *Colbert v. State*, 124 Ga. App. 283 (1971), the Court recognized that, " . . . the burden is on the State, not on the Defendant, to show that the latter's constitutional rights are preserved."

Petitioner submits that it was improper for the trial court to admit the testimony of Ira W. Brown, over objection, where his testimony was bottomed on an incriminating statement made by the Petitioner while "in-custody" where the investigation had obviously focused upon him.

4. On October 24, 1973, Ira W. Brown obtained a Search Warrant based upon the following affidavit:

> "The probable cause on which the belief of the affiant is based is as follows: I attended the Festival Theatre on October 23, 1973, and paid a $5.00 admission charge and saw the film entitled 'The Devil in Miss Jones'. The Film is advertised in the Atlanta Construction as the feature attraction for October 24, 1973. The film shows acts of fellatio performed by a female, shows a female placing grapes into her vagina and subsequently eating the grapes, shows a female masturbating by placing a banana into her vagina, shows clearly the penetration of the male penis into the anus of a female, shows two females performing the act of cunnilingus on a female and shows two males simultaneously having intercourse with a female, one penetrating the vagina while the other penetrates the anus. Such acts as the above consume the entire playing time of the film. At one point a male ejaculates into the mouth of a female. This movie is hard-core pornography."

In *Speiser v. Randall*, 357 U.S. 513 (1958), this Court stated:

> "The line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn. The separation of legitimate from illegitimate speech calls for . . . sensitive tools . . ."

See *Roaden v. Kentucky*, 413 U.S. 496, at 501. wherein this Court held:

> "The Fourth Amendment proscription against 'unreasonable . . . seizures,' applicable to the States through the Fourteenth Amendment, must not be read in a vacuum. A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material."

* * * * *

> "*Marcus v. Search Warrant, supra*, held that a warrant for the seizure of allegedly obscene books could not be issued on the conclusory opinion of a police officer that the books sought to be seized were obscene. Such a warrant lacked the safeguards demanded 'to assure nonobscene material the constitutional protection to which it is entitled . . . [T]he warrants issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene.' 367 U.S., at 731-732. There had been 'no step in the procedure before seizure designed to focus searchingly on the question of obscenity.' *Id*, at 732."

* * * * *

"*Lee Art Theatre v. Virginia, supra,* was to the same effect with regard to seizure of a film from a commercial theater regularly open to the public. There a warrant for the seizure of the film was issued on the basis of a police officer's affidavit giving the titles of the film and asserting in conclusory fashion that he had personally viewed the films and considered them obscene. The films were seized pursuant to the warrant and introduced into evidence in a criminal case against the exhibitor. Conviction ensued. On review, the Court held that '[t]he admission of the films in evidence requires reversal of petitioner's conviction' because

> "[t]he procedure under which the warrant issued solely upon the conclusory assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusions was not a procedure 'designed to focus searchingly on the question of obscenity,' *id.*, [*Marcus v. Search Warrant, supra*] at 732, and therefore fell short of constitutional requirements demanding necessary sensitivity to freedom of expression.' *Lee Art Theatre v. Virginia,* 392 U.S., at 637."

In the instant case, the affiant merely recited what he considered to be "highlights"for purposes of obtaining a search warrant, without relating to the issuing magistrate the *entire* context of the motion picture film which was of full-length with duration in excess of one hour. The affiant's subjective evaluation that the motion picture film was "hard-core pornography" in no way buttresses his affidavit, for constitutional purposes. Additionally, the recitation of sexual activity is of no constitutional import in that such graphic depictions are not in and of themselves "contraband" or in violation of the law (see *U.S. v. Language of Love,* 432 F.2d

705), considering the status of Georgia's obscenity statute at the relevant point in time, to-wit: October 23, 1973. It is readily apparent that at that point, the statute did not "specifically define" prohibited sexual conduct, notwithstanding this Court's previous position in *Paris Adult Theatre* that the Court had "dealth with" specific sexual activities.

On November 6, 1973, Ira W. Brown made an affidavit, once again, for a Search Warrant to seize the motion picture film "The Devil in Miss Jones": (R-6)

> "Personally appeared before me, the undersigned, a peace officer of the State of political subdivision thereof, who after being duly sworn, deposes and on oath says that on November 5, 1973, affiant, Ira W. Brown, an investigator for the office of the Solicitor General of Fulton County, viewed a movie entitled "The Devil in Miss Jones" at the Festival Cinema located at 142 Spring St., Atlanta, Fulton County, Ga. Said motion picture film contained scenes of fellatio, intercourse and homosexual activities which are more fully described by the affidavit of Ira W. Brown, attached hereto and is hereby made a part of this search warrant by reference. Said film is obscene and in violation of Georgia Code Ann. 26-2101. Said film was the subject of a commitment hearing on November 2, 1973, where the defendants in that case were bound over for violating Ga. Code Ann. 26-2101. Said film is 'hard-core pornography' and is now concealed at the Festival Cinema, 142 Spring St., Atlanta, Fulton County, Georgia."

The affidavit refers to a second affidavit reportedly sworn to by Ira W. Brown on November 5, 1973 (R-8,9):

"Before me the undersigned attesting officer, comes Ira W. Brown, who deposes and says:

I am an Investigator for the Solicitor General of the Criminal Court of Fulton County and that I have held this position for approximately 15 years.

That on October 23, 1973, I viewed a movie entitled 'The Devil in Miss Jones' at the Festival Cinema, 142 Spring St., N.W., Atlanta, Georgia, and on October 24, 1973, arrested the employee of the above theatre for Vio. Ga. Code Code Section 26-2101.

On November 2, 1973, 'The Devil in Miss Jones' came on for a hearing before a magistrate and was bound over to the Criminal Court of Fulton County.

On November 5, 1973, I viewed the same movie at the Festival Cinema, 142 Spring St., N.W., entitled 'The Devil in Miss Jones' and saw the same scenes which can be described as follows:

This picture starts with a female looking out window of apartment and then going into bathroom, runs tub of water, undresses and gets in water, slits both wrists with safety razor blade, with blood running from the wrists she dies. Next scene she goes before a mediator for the devil applying for a job. Mediator states she would be up there except for taking her life, because there were no blemishes on her record and that she was a virgin. All scenes from then on show her having intercourse, performing fellatio with male and male performing cunnilingus with female. One scene shows a rubber instrument inserted in the female's rectum as she performs fellatio on the male afterwards placing instrument in her mouth. Another scene shows male placing his thumb in female's rectum as she performs intercourse. Next scene is two females is in a

tub with water running through a small tube and she inserts tube in vagina, rectum and mouth. Another scene where female is lying on a bed with bowl of fruit beside bed and taking grapes and placing in vagina, then eating them. The same with a banana simulated as a penis. Another scene has a live snake on body and places snake in her mouth licking her tongue as the snake did. Another scene is two women performing fellatio on a male and the two females rub the semen over their face. Another scene is two males and one female with one male having intercourse in the vagina and the other male having intercourse in the anus.

The language used was 'fuck me harder, put your cock in my ass, place your cock in my cunt, don't come in me I want to feel it on my body' etc.

The last scene shows the female masturbating with her finger as a male sits on the floor. She states 'damn You I cannot do it myself.'

The aforegoing affidavit is true and correct to the best of my belief and knowledge."

Once again, the affiant merely states the sexual activity contained in the motion picture film and then refers to the second affidavit which was executed on November the 5th. Affiant's opinion that the motion picture film is "obscene" is insufficient to support the issuance of a search warrant as is the fact that there had been a "commitment hearing" previously and the defendants were "bound over". Such a commitment hearing does not establish anything conclusively. *Georgia Code Annotated* §*27-407.* As previously contended, the assertion that the film is "hard-core pornography" is likewise insufficient. The affidavit is constitutionally insufficient.

For the reasons stated herein, the Court erred in failing to suppress the evidence introduced against Petitioner, said evidence being seized pursuant to the above described affidavits.

5. *Georgia Code Annotated* §*26-506* (multiple prosecutions for same conduct) provides that where there is the same conduct, as accused cannot be charged and convicted of two (2) separate crimes. Petitioner submits that there was but one (1) course of conduct and if a crime has been committed, he should be punished but one (1) time for such conduct, especially in light of the fact that the instant case involves the *First Amendment* to the *Constitution of the United States* concerning expression rather than anti-social conduct. In *Bell v. United States*, 349 U.S. 81 (1955), this Court held:

> "It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment."

In *Gee v. State*, 225 Ga. 669, the Court held:

> "This Court in *Harris v. State*, 193 Ga. 109, 114, 17 S.E.2d 573, 147 A.L.R. 980, pointed out that confusion exists in the decisions of this court with reference to the test for determining former jeopardy. In the *Harris* case this court defined the 'same evidence' test and the 'same transaction' test, and concluded that this court applied the same transaction test, although applying elements pertaining to the same evidence rule. The court held that 'in order for the transaction to be the same, it must be identical both as a matter of fact and as a matter of law.' "

The instant case falls within the Court's criteria in that the issue of fact was identical as was the issue of law. The

accusation charged two (2) counts of violating the same crime and the proof involved a regularly scheduled showing of a motion picture in a theatre with no disruption of scheduling. Merely because Petitioner was arrested on two (2) separate days for a motion picture film displayed on two (2) separate days does not allow the State to "pyramid" the charges *and* punishment. *Phillips v. State*, 99 Ga. App. 424 (1959); *Estes v. State*, 98 Ga. App. 521 (1958).

Unlike the case of *Steele v. State*, 227 Ga. 653 (1971), the State *did* rely on "the same conduct" rather than the same "type of conduct" and thus the charge and conviction herein cannot stand. See *Adams v. State*, 201 S.E.2d 649 (1973) citing *Roberts and Copenhaven v. State*, 14 Ga. 8 at 12 to the effect that "the plea of *autre fois acquit* . . . is sufficient, whenever the proof shows *the second case to be the same transaction with the first.*"

> ". . . the mere fact that two dates are involved is not sufficient, by itself, to show two transactions, since the criminal transaction may or may not be limited to a single day, but the day does not constitute the crime."
>
> "Each day, however, that a defendant has such a slot machine, he is committing the same, and not a different offense, so that while he may be convicted once, and proof of his keeping the machine may be confined to a single day within the period of limitations, proof that he also had the machine on the following day, or the day before, will not authorize his conviction for a second offense."
>
> "There must be evidence of chance as to each count, and the evidence must disclose that a prize was a part of the scheme as to each count. If any of these elements relate to the same counts, then both refer to

> the same lottery, and a conviction on separate counts for the same lottery would result in the defendant being convicted twice, or even more than twice, for the same offense."

Phillips v. State, supra.

Under the test where the same proof is used to prove two offenses, there is an identity of offenses, it is clear that only one offense occured herein. *See Robbins v. United States,* 476 F.2d 26 (10th Cir. 1973); *United States v. McCall,* 489 F.2d 359 (2nd Cir. 1973); *United States v. Vaughan* 491 F.2d 1096 (5th Cir. 1974). As only the date differed, a continuous showing of the film was involved, and two separate arrests were made, it is clear that the offenses charged, both in law and in fact, are the same offense. *See United States v. Ewell,* 383 U.S. 116 (1966); *Gore v. United States,* 357 U.S. 386 (1958); *Ebeling v. Morgan,* 237 U.S. 625 (1915).

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Supreme Court of Georgia.

Respectfully submitted,

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APPENDIX "A"

IN THE SUPREME COURT OF GEORGIA

DYKE

v.

THE STATE

29011 Decided: September 24, 1974

INGRAM, Justice.

We review in this case appellant's conviction in the Criminal Court of Fulton County on two counts of exhibiting obscene material in violation of Ga. Code Ann. § 26-2101. Categorically, the appeal deals with three areas of enumerated trial error: (1) the overruling of appellant's motion to dismiss the two-count accusation; (2) the sufficiency of the evidence; and (3) various rulings by the court during the trial, including the correctness of the jury instructions. Each of the alleged errors in these categories will be examined in this opinion.

The case arose as a result of a visit made on October 23, 1973, by a Fulton County investigator to the Festival Cinema Theatre in Atlanta to view a film entitled "Devil in Miss Jones." After purchasing a ticket and seeing the movie, the investigator presented an affidavit to a judge in Fulton County and obtained a warrant to search the threatre premises and seize the film. On the following day, the investigator returned to the theatre with two Atlanta policemen and after they viewed the film, the warrant was served and several employees of the theatre were arrested. Appellant was at a counter in the lobby and the officers first asked him who was the manager of the theatre. Appellant replied that he was the manager and the investigator then identified himself and arrested appellant and two other employees. A commitment hearing was held on November 2, 1973, and as a result of of that hearing appellant was bound

over for trial. Three days later, the same investigator returned to the theatre and again viewed the same film being exhibited there. A second warrant was obtained on another affidavit by the investigator and a commitment hearing was waived on it. Thereafter, a two-count accusation was drawn charging appellant with exhibiting obscene material on these two separate dates and the case went to trial before a judge and jury. At the trial, the state presented oral evidence from the investigator, including testimony that appellant was present on each occasion when the film was shown. The state also exhibited the film to the jury. Appellant presented the testimony of a clinical psychologist regarding the nature of the film and its social value. After receiving instructions from the trial judge, the jury returned a verdict of "guilty" on both counts and appellant received a sentence of 12 months and a $1,000 fine on each count, to be served consecutively.

I

Motion to Dismiss

Appellant argues that Georgia Code Ann. § 26-2101, the obscenity statute under which he was convicted, is too vague and overly broad to withstand the constitutional attacks made on it in this case and that his conviction is a denial of due process of law. It is also argued that the accusation is fatally defective because it did not specify the requisite elements of the offense with which appellant was charged.

Appellant acknowledges the decision of this court in *Slaton, et al. v. Paris Adult Theatre I, et al.*, 231 Ga. 312 (201 SE2d 456) (decided October 30, 1973), but argues that the construction given the obscenity statute in that case is erroneous because the statute fails to give fair warning that criminal liability under it is dependent upon standards announced by the U. S. Supreme Court in *Miller*[1] after the Georgia statute was written.

[1] Miller v. California, 413 U.S. 15, 93 SC 2607 (1973).

All of these well reasoned arguments were made on behalf of appellant in his counsel's brief filed in this court on June 30, 1974. Four days later, the U. S. Supreme Court decided the case of Hamling v. United States, 42 U.S.L.W. 5035 (U. S. June 24, 1974), approving the application of a pre-Miller federal mailing statute to post-Miller defendants. Although the *Miller* obscenity standards were not spelled out in this federal statute, the Court there rejected the same argument urged here by appellant and in doing so, stated: "... the language of Roth[2] was repeated in *Miller*, along with a description of the types of material which could constitutionally be proscribed and the adjuration that such statutory proscriptions be made explicit either by their own language or by a judicial construction ..." Id. at 5043.

We pointed out in *Paris Adult Theatre I, supra,* "that the Georgia statutory definition (of obscenity) has been previously authoritatively construed by this court to include those standards for obscenity as permitted by *Miller.*" 231 Ga. 312, 315. We also cited several case examples where this court has defined obscenity, within the meaning of this statute, in substantially the same descriptive language used by the Supreme Court in *Miller.* This list of case examples was not intended to be exhaustive, but merely to illustrate that obscenity under the Georgia statute had been previously construed in a manner consistent with the new *Miller* standards. Therefore, the public generally, including commercial exhibitors of films, had been given fair warning because the descriptive language used in *Miller* contained similar descriptions of obscene materials.

More importantly, all of appellant's constitutional arguments in this case must fail for the reason that on July 25, 1974, the U. S. Supreme Court denied certiorari in *Paris*

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[2] Roth v. United States,354 U.S. 476, 77 SC 1304, 1 LE2d 1498 (1957).

Adult Theatre I, et al., v. Slaton, et al. after consideration by the Court of remarkably similar constitutional attacks made on the Georgia obscenity statute for vagueness and overbreadth, and also for alleged denial of due process resulting from this court's previous construction of the obscenity statute in the *Paris Adult* case. This removed the constitutional challenge to the present obscenity statute in Georgia and further discussion of these same issues would be pointless.

We turn next to appellant's contention that the accusation under which he was tried is fatally defective, as it failed to allege the requisite elements of the offense, i.e., the specific standards for judging obscenity set forth in *Miller*, supra. As noted by the Supreme Court in *Hamling*, supra, "the various component parts of the constitutional definition of obscenity need not be alleged in the [accusation] in order to establish its sufficiency . . ." 42 U.S.L.W. 5035, 5044. The language used in the present accusation described the offense in the language of the statute and contained the same construction approved by this court in *Paris Adult Theatre I*, supra. We cannot agree that it is defective as it adequately alleges the offense with which appellant was charged in each count. See, Ca. Code Ann. § 27-701.

II

Sufficiency of the Evidence

Appellant contends that the evidence is insufficient to sustain a finding that the film is obscene and that the evidence fails to prove he had any control over the showing of the film or knowledge of its content.

Appellant argues that this film is not merely a "stag film," but is a full length film with a continuous story line, an attempt at innovative lighting, and that a moral can be

gleaned from viewing it. Therefore, appellant asserts, the film is not "utterly without redeeming social value," one of the tests still required in Georgia to find obscenity. Appellant argues that the film has at least a modicum of social value since it goes beyond a mere "pretense," and appellant relies on United Artists v. Gladwell, 373 FSupp 247 (S.D. Ohio, 1974), and U. S. v. Language of Love, 432 F2d 705 (2nd Cir. 1970), to conclude that under the evidence in this case, including the testimony of the clinical psychologist, this film is not obscene.

We are not bound to prove the jury's finding that this film is obscene, since it is clear the United States Supreme Court has determined that an independent appellate review must be made of the material to decide the constitutional fact of obscenity. Jenkins v. Georgia, 42 U.S.L.W. 5055 (U. S. June 24, 1974); see, also, United States v. Groner, 479 F2d 577 (5th Cir. 1973); and, Jacobellis v. Ohio, 378 U. S. 184, 84 SC 1676, 12 LE2d 793 (1964). We have discharged this constitutional duty by an *en banc* review of this film, "Devil in Miss Jones." Each member of this court concludes from viewing the film that it is rank, hard core, pornography. The conduct of the film actors includes individual and group sexual acts of intercourse, fellatio, and cunnilingus. The film is primarily devoted to acenes depicting bizarre acts of both natural and aberrational sexual conduct that are not necessary to describe in further detail here. During these scenes, the camera focuses primarily upon the actors' genitals which are displayed in a lewd manner. The majority of the scenes depict sexual activity and they appeal to exist solely for their own lewd and lascivious purpose and add no other discernible meaning to the film. The so-called plot which appellant urges is accomplished by the placing of a brief backdrop in the initial scene of the film which shows a woman commiting suicide for which she is to be sent to hell. However, she is permitted to return to earth to lead a life consumed with lust while awaiting the devil's call to go to hell. This woman, who is "Miss Jones," then indulges in every conceivable sexual perversion which she can devise until her time on earth is

ended. The rather brief opening scene is followed by the major portion of the film which is devoted to a variety of sexual experiences. In the final scene, Miss Jones is summoned by the devil and doomed to spend infinity with a deranged male completely uninterested in her voracious sexual appetite.

It is our view that an otherwise obscene film cannot be constitutionally salvaged by adding to it a vague moral which is superimposed on the predominant theme of the film which is an appeal to a prurient interest in sex. This film, in the opinion of the court, is utterly without redeeming social value. It is barren of any effort to express an idea or serve even a questionable social purpose. We find, upon application of the standards set forth in *Paris Adult Theatre I v. Slaton*, supra, that the film, "Devil in Miss Jones," is obscene as a matter of constitutional law and fact.

Appellant further argues the evidence is legally insufficient to sustain his conviction for exhibition of this film because it failed to show he had control over the showing of the film or knowledge of its content. The evidence shows that the film was advertised on the marquee of the theatre managed by appellant and that the theatre was an "adult theatre." Appellant was shown to be on the premises when the film was exhibited on the two separate dates charged in the accusation and, on the second occasion, appellant sold tickets for admission to see it. This was sufficient to authorize the jury to conclude that on each occasion appellant at least aided and abetted in the exhibition of the film. See Ga. Code Ann. § 26-801. Appellant's reliance upon *Sokolic v. State*, 228 Ga. 788 (187 SE2d 822 (1972) is misplaced. The evidence there showed only that the defendant had made an application for a business license to operate a bookstore almost two years prior to the date of the alleged crime and failed to show that defendant had any connection with the store at the time he was charged with selling obscene material through the store.

We must also reject appellant's contention that the evidence failed to prove scienter or guilty knowledge by him of the nature of the film itself. Under Ga. Code Ann. § 26-2101, the applicable test for knowingly exhibiting obscene material is whether the defendant has "knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material." The evidence need not show appellant actually knew the film was legally obscene. See, Rosen v. United States, 161 U. S. 29, 16 SC 434, 40 LE2d 606 (1896); United States v. Thevis, 484 F2d 1149 (3) (5th Cir. 1973); and, Hamling v. United States, supra, at 5046. We believe the evidence presented by the state in this case was sufficient to authorize the jury to find beyond a reasonable doubt that appellant was guilty of both counts of this accusation.

Appellant further urges that his constitutional right against self-incrimination was violated when the state was permitted to introduce into evidence appellant's statement that he was the manager of the theatre. Appellant's argument is that this statement was elicited by the state investigator without first giving the warning required by Miranda v. Arizona, 384 U. S. 436 (1966). We find no merit in this argument since, at the time of this question, appellant was not in custody and the criminal investigation had not focused upon him as an individual. *Miranda* was written to "protect the right against self-incrimination of citizens taken into custody or otherwise restrained who are suspected or accused of crime." *Carnes v. State*, 115 Ga. App. 387, 391 (154 SE2d 781) (1969). *Miranda* simply does not apply to the inquiry made of appellant under the facts of this case. Therefore, appellant's statement was properly admitted into evidence by the trial court and could be used by the jury in reaching its verdict.

III

Rulings by the Court

Appellant strongly contends that the trial court erred in not suppressing as evidence the motion picture film seized twice by the state because the affidavits used to obtain the search warrants were legally insufficient. Appellant argues that in each instance the affiant merely recited what he considered to be "highlights" of the film to obtain search warrants without relating the entire text of the film to the judge who issued the warrants. Appellant further argues that affiant's subjective evaluation that the film was "hard core pornography" does not support the affidavit for constitutional purposes. Appellant primarily relies on the rule applied in Lee Art Theatre v. Virginia, 392 U. S. 636 (1968), where it was observed that: "That procedure under which the warrant issued solely upon the conclusory assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusions was not a procedure 'designed to focus searchingly on the question of obscenity' (citing from Marcus v. Search Warrant, 367 U. S. 717, 732-32), and therefore fell short of constitutional requirements demanding necessary sensitivity to freedom of expression." Id. at 637.

A review of the affidavits used to secure the two warrants issued in this case reveals factual descriptions of numerous representative scenes depicted in the film. These affidavits were sufficient to show probable cause for the issuance of the warrants. See, Heller v. New York, 413 U. S. 483, 93 SC 2789 (1973); and, Crecelius v. Commonwealth, 502 SW2d 89 (1973).

We also note that a commitment hearing was held nine days after service of the first warrant and at that adversary hearing the committal judge determined from the evidence that probable cause existed to conclude there was a violation of the Georgia obscenity statute by appellant. Thereafter, appellant proceeded at his own risk to participate in the exhibition of another copy of the same film by selling admission tickets to the theatre. With regard to the seizure of the second copy of the film, we are aware of the implication of prior restraint. As stated in *Heller*, "On a showing to the trial court that other copies of the film are not available to the exhibitor, the court should permit the seized film to be copied so that showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding." Id. at 492, 493. In the present case, at the time of seizure of the second copy, there had been a judicial determination (of probable cause) in an adversary proceeding that the film was obscene. In addition, there has been so showing here that seizure of the second copy left the exhibitor without another copy to exhibit, nor is there any evidence that he made any request to copy the film. The Supreme Court, in *Heller*, was seeking to strike a balance between the facilitation of seizing allegedly obscene material as evidence while minimizing the effect of prior restraint of possible First Amendment rights See, Crecelius v. Commonwealth, supra, at p. 92.

We conclude that the search and seizure in this case were not invalid for any reason urged by appellant.

Appellant also argues that he was denied a fair trial by the trial court's interference with the presentation of the defense in the case, and by other conduct which demonstrated prejudice against appellant during the trial of the case. A review of the record does reveal a good deal of conflict between the court and counsel during the trial but it fails to show prejudice against appellant. Most of it occurred in an effort by the court to require counsel in the case, both

for the state and the defendant, to present properly to the jury admissible evidence on the correct legal issues to be decided in the case. It is the duty of the trial court to control the trial of the case and to insure a fair trial to both sides on the disputed issues in the case. Sometimes this requires interference by the court with the conduct of counsel or with a witness in the trial. The trial judge has broad discretion in handling these matters and we are loath to interfere with that discretion unless it is manifestly abused by clearly demonstrated prejudiced or unfairness. While another trial judge may not have conducted the trial of this case in the same way as this trial judge did, we do not agree the trial court interfered so as to deprive the appellant of a fair trial. See, *Carr v. State*, 76 Ga. 592, 593 (2-c) (1885), and *Wilson v. State*, 229 Ga. 224 (2) (SE2d) (1972).

It is also urged in this appeal that the trial court improperly instructed the jury on the law in the case and the conviction must be reversed because of it. Appellant argues that the jury was prevented from intelligently passing upon the issues in the case because the trial court gave instructions on the law to the jury four times during the trial and that each instruction was different. Appellant also contends that parts of the instructions were argumentative and incomplete.

It is well settled by case law that the charge of the court must be taken in its entirely when considering its impact upon the jurors. See, *Cooper v. State*, 212 Ga. 367 (92 SE2d 864); and, *Fox v. Burns*, 142 Ga. 119 (2) (82 SE 521) (1914). The record shows the trial judge was concerned during the trial of the case that the jury know the essential elements of the crime with which appellant was charged in order to understand the evidence being introduced on the issues in the case. In attempting to clarify for the jury the involved legal questions they had to consider, the trial judge did instruct the jury several times during the trial. Although the language in each instruction was not identical, when taken as a whole the jury was clearly informed of the correct

applicable law as it related to the question of obscenity and the responsibility of the jury in the case. The instructions given by the trial judge are supported by the decision of this court in *Slaton v. Paris Adult Theatre I, et al.*, supra, and the trial court was careful to instruct the jury that it was not emphasizing any part of the instructions by repetition. Under the circumstances of this case, we find no reversible error arising from the repetition of instructions given by the trial court.

Appellant also urges that in explaining the community standard portion of the obscenity statute, the trial judge improperly used confusing and argumentative language. Excerpts from the language complained of in the charges are as follows: "...the community of Georgia, as evolved from generation to generation along with our civilization... by general cencensus of the community of Georgia as a whole, would be offensive to the common instincts of decency of people generally ..." Subsequent to the trial of this case, the United States Supreme Court in *Hamling*, supra, approved the use of similar language in the following charge: "The trial court instructed the jury that it was to judge the obscenity *vel non* of the brochure by reference to 'what is reasonably accepted according to the contemporary standards of the community as a whole,... This phrase means, as it has been aptly stated, the average conscience of the time, and the present critical point in the compromise between candor and shame, at which the community may have arrived here and now.'" 42 U.S.L.W. 5035, 5039. We conclude the trial court's instruction in the present case was not error.

Finally, we note the trial court clearly pointed out to the jury that all elements of the definition of obscenity "must coalesce and co-exist." We believe this instruction served to cure any error in the court's use of the disjunctive "or," rather than the conjunctive "and" in the parts of the charge complained of by appellant. Appellant also argues that the failure of the trial judge to define the words, "shameful or

morbid," as requested by appellant at the trial, prevented the jury from intelligently passing upon the appellant's guilt and denied appellant a fair trial. We agree with the appellee that these words used in the statute to define a prurient interest in sex are not words of art but rather are words of common understanding and meaning which require no definition themselves from understanding by the jury.

Therefore, we conclude that the instructions of the trial court, when considered in their entirety, were correct and did not deprive appellant of a fair trial.

Appellant further claims a denial of his double jeopardy rights under the State (Code Ann. § 2-108) and Federal (Fifth Amendment) Constitutions in that he was convicted and sentenced for two crimes when there was but one single transaction in this case. Appellant cites Ga. Code Ann. § 26-506 (multiple prosecutions for same conduct) to contend here there was but one course of conduct and that if a crime has been committed, he can be punished only once for it. Appellant argues that the accusation charged him in two counts of violating the same crime and that the proof involved a regularly scheduled showing of a motion picture in a theatre with no disruption of scheduling. The exhibition of the film on two separate dates, appellant argues, does not permit the state to "pyramid" the charges and punishment against him. Appellant relies primarily upon the cases of *Phillips v. State*, 99 Ga. App. 424 (108 SE2d 721) (1959), and *Estes v. State*, 98 Ga. App. 521 (106 SE2d 405) (1958). Those cases each dealt with lotteries where defendants had sold chances to different people on separate dates for a prize. However, in neither case did the evidence show each transaction involved a different lottery. That is, the evidence did not show that there was more than one drawing and prize so it was held that even though several tickets were sold to different people, they were all for the same lottery and this constituted a single crime.

The facts of the present case are distinguishable from *Phillips* and *Estes*. Ga. Code Ann. § 26-2101 states that, "A person commits the offense of distributing obscene materials when he . . .exhibits or otherwise disseminates to any person any obscene material . . ." Unlike the multi-faceted lottery, a separate offense occurred each time the obscene film was exhibited. Under the rationale of *Phillips* and *Estes*, perhaps it could logically be argued that if appellant sold tickets to see the film on different dates, but had exhibited the movie only once, there would be only a single crime, but that is not the case here. There were two distinct episodes involving different dates of exhibition and even different copies of the same film. This record shows two criminal violations, not a single crime.

This court agrees that First Amendment rights deserve strong protection, e.g., Sanders v. State of Georgia, 231 Ga. 608 (203 SE2d 153) (1974). However, in this case appellant was put on notice, at the commitment hearing, that probable cause existed to believe that this film, "Devil in Miss Jones," was not within the realm of protected expression. In the face of this judicial finding of probable cause for violating Ga. Code Ann. § 26-2101, appellant returned to the theatre and commenced to particpate in the exhibition of a second copy of the same film. This was done at his own risk and appellant will not now be heard to claim double jeopardy as a bar to his conviction for the second offense. See, Crecelius v. Commonwealth, supra.

Judgment affirmed. All the Justices concur.

APPENDIX "B"

Constitutional and Statutory Provisions.

1. The pertinent provisions of the First Amendment are:

> "Congress shall make no law . . .abridging the freedom of speech, or of the press . . ."

2. The pertinent provisions of the Fourth Amendment are:

> " . . .no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. The pertinent provisions of the Fifth Amendment are:

> "No person shall . ...be deprived of life, liberty, or property, without due process of law . . ."

4. The pertinent provisions of the Fourteenth Amendment are:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

5. The pertinent provisions of the Constitution of the State of Georgia, Article I, Section I, are:

   a. Paragraph III (Georgia Code Annotated § 2-103): "No person shall be deprived of life, liberty, or property, except by due process of law."

b. Paragraph VI (Georgia Code Annotated § 2-106): "No person shall be compelled to give testimony in any manner to criminate himself."

c. Paragraph VIII (Georgia Code Annotated § 2-108): "No person shall be put in jeopardy of life, or liberty, more than once for the same offense, save on his, or her own motion for a new trial after conviction, or in case of mistrial."

d. Paragraph XVI (Georgia Code Annotated § 2-116): "...no warrant shall issue except upon probable cause, supported by oath, or affirmation, particularly describing the place, or places, to be searched, and the persons or things to be seized."

6. The pertinent provisions of *Georgia Code Annotated* § 26-506(a) are:

(a) "When the same conduct of an accused may establish the commission of more than one crime, the accused may be prosecuted for each crime. He may not, however, be convicted of more than one crime if (1) crime is included in the other, or (2) the crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct."

7. The pertinent provisions of *Georgia Code Annotated* § 26-2101 are:

"(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do: Provided, that the word "knowing" as used herein shall be deemed to be either actual or constructive knowledge of the

obscene contents of the subject-matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.

(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or represening such matters. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(c) Material, not otherwise obscene, may be obscene under this section if the distribution thereof, deemed or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal . . ."

SUPREME COURT, U. S.
MAR 31 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-903

EDWARD H. DYKE,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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IN THE

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EDWARD H. DYKE,

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v.

STATE OF GEORGIA,

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BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

PART ONE

The State of Georgia, Respondent, by and through Hinson McAuliffe, Solicitor General, Criminal Court of Fulton County, pray that the Application for Writ of Certiorari to the Supreme Court of Georgia to review the judgment entered in this case on September 24, 1974, be denied.

OPINION BELOW

The decision sought to be reviewed by this Court is reported at 232 Ga. 817, 209 S.E. 2d 166 (1974). It is also set out as" Exhibit A" in Petitioner's Petition for Writ of Certiorari, appendix.

JURISDICTION

Respondents adopt Petitioner's jurisdictional statement.

QUESTIONS PRESENTED

1. Whether the trial court erred in its instruction to the jury.

2. Whether the rulings by the trial judge prejudiced the defendant.

3. Whether the court erred in admitting into evidence the defendant's statement that he was the manager in response to a question by a law enforcement official without *Miranda* warnings where the defendant was not in custody nor had the investigation focused upon him.

4. Whether the affidavits upon which the seizure of the films were based were sufficient and did not amount to a mere conclusion of law enforcement officials.

5. Whether the accusing of the defendant in two counts alleging that the date is an essential averment subjected the defendant to multiple prosecutions for the same offense, thereby violating the double jeopardy provisions of the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Repondents adopt the constitutional and statutory provisions set forth in Appendix "B" of the Petition for Certiorari, appendix with the addition of Ga. Code Ann. 24-104 (4) set forth as appendix "A".

STATEMENT OF FACTS

At the request of the Solicitor General of Fulton County, on October 23, 1973, an Investigator for the Office of the Solicitor General experienced in investigating obscene films went to the Festival Theatre in order to view a film. The marquee of the theatre read "The Devil in Miss Jones" and the admission price was five dollars. After viewing the film "The Devil in Miss Jones" the investigator wrote an affidavit, presented it to a judge the following day and a search warrant issued. After viewing the film again, the investigator approached the counter in the theatre and asked the defendant who the manager was. After the defendant informed the investigator that he was the manager, the investigator identified himself, served the search warrant, took one copy of the film "The Devil in Miss Jones," and arrested the defendant and other employees. A commitment hearing was had on November 2, 1974, and the defendant was bound over.

On November 5, 1974, three days after the defendant's commitment hearing, the same investigator returned to the same theatre and again viewed the film "The Devil in Miss Jones." The investigator again drew an affidavit and obtained a search warrant which was served November 6, 1974. Each time the investi-

gator went to the theatre, the defendant was present. The commitment hearing on the second arrest was waived. Thereafter, a two count accusation was drawn alleging that the defendant distributed obscene material on two named dates, the dates being an essential averment.

At no time did the defendant contend that he did not have a print to show during the period between arrest and commitment.

On the trial of the case, the film was shown to the jury. The film is hard core pornography and consisted entirely of acts of intercourse, sodomy and masturbation. The jury returned a verdict of guilty on both counts.

The Supreme Court of Georgia affirmed and a petition for certiorari was filed in this court on January 22, 1975.

PART TWO

ARGUMENT AND CITATION OF AUTHORITY

A. THE INSTANT CASE DOES NOT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT NOR DECIDE SUBSTANTIAL FEDERAL QUESTIONS OF NATIONWIDE IMPORT.

1. THE COURT DID NOT ERR IN ITS CHARGE ON THE ELEMENTS OF OBSCENITY.

The charge of the court must be taken as a whole, Fox v. Burns, 142 Ga. 119, 82 S.E. 521 (1914). See Cooper v. State, 212 Ga. 367, 92 S.E. 2d 864 (1956). Out of an abundance of caution and because of the complexity of the issue the trial judge instructed the jury on the elements of the offense numerous times. Each time, although the wording was different, the elements

were the same—that is, as a matter of law, the charges complained of, taken as a whole comport in every way to the language in Paris Adult Theatre v. Slaton, 231 Ga. 312; 201 S.E. 2d 440 (1973).

The court charged the jury twice that the "sexual conduct" was the depiction of nudity or excretion in a patently offensive way. A statement of law founded upon Paris Adult Theatre v. Slaton, 231 Ga. 312; 201 S.E. 2d 440 (1973).

The court was careful to instruct the jury that it in no way was emphasizing any part of the charge by repeating. The part of the charge underlined by defendant in his brief and which are referred to as argumentative were approved in Hamling v. U.S. _____ U.S. _____; 94 S.Ct. 2887 (1974).

The charge objected to is as follows:

> "The Court charges you in this connection that what is obscene material is determined by the sensibilities and the moral standards of the people or community as a whole, and that is the community of Georgia, as evolved from generation to generation along with our civilization. What is obscene in one period may not be obscene in another period of our civilization. Whether one commits a violation of the Georgia law, as heretofore given you in this charge, depends upon the time, the place, the manner by which one exhibits or offers to do the same, or otherwise disseminates the alleged obscene material and all of the circumstances surrounding the exhibition, or the offering of the exhibition of the same—in this case it's the film.
>
> In determining whether the material predominantly appeals to a shameful and morbid interest in sex, excretion, or nudity, and whether the said material is patently offensive because it goes sub-

> stantially beyond the customary limits of candor in describing or representing certain matters; you must consider what, by general consensus of the community of Georgia, as a whole, whould be offensive to the common instincts of decency of people generally."

This court approved the following charge in *Hamling:*

> "The trial court instructed the jury that it was to judge the obscenity vel non of the brochure by reference to what is reasonable accepted according to the contemporary standards of the community as a whole . . . contemporary community standards means the standards generally held throughout this country concerning sex and matters pertaining to sex. This phrase means, as it has been aptly stated, the average conscience of the time, and the present critical point in the compromise between condor and shame, at which the community may have arrived here and now."

This is almost identical to the charge given by the trial court.

In addition, the court was very careful to point out in its charge that all the elements must "coalesce and co-exist." Any use of the disjunctive rather than conjunctive was amply cured.

The charge given the jury as to the weight of opinion testimony is a correct statement of the law. Allen v. Allen, 71 Ga. App. 272; 30 S.E. 2d 665 (1944). Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973); American Mutual Liability Ins. Co. v. Brackin, 68 Ga. App. 256; 23 S.E. 2d 505 (1942).

In any event, the evidence is so overwhelming against the defendant that any error in charge, if there is any, is only harmless error. Jones v. Ga. 105 Ga. 649 31 S.E.

505 (1898). No reasonable man after seeing "The Devil in Miss Jones" could doubt its obscenity.

2. THE TRIAL JUDGE DID NOT THROUGH HIS CONDUCT OF THE TRIAL INTERFERE WITH THE DEFENDANT'S DEFENSE.

It is the duty of counsel to protect their clients from wrong and injustice. It is the duty of the judge to protect the law from being outraged, Kelley v. Strouse, 116 Ga. 872; 43 S.E. 280 (1902).

The trial judge attempted at every phase of the trial to see that the ends of justice were met. Both the State and the defendant were treated equally and fairly. The Court bent over backwards to preserve error for defendant. The Court: I'm going to let you turn the lights out, and start from the beginning. Let it also be noted that Defense Counsel made no objection until the Court, at the beginning of it, made some statements about it. Now, if you have any legitimate grounds for preserving your clients rights, or the State's rights, then it's your duty to make objections and get it in the record, and it's the duty of the Court to see that it is in the record, and the Court will carefully guard those rights for you.

The judge asked for objections from Defense Counsel.

THE COURT: If I hear no objection. . . . The court was very careful to correct improper use of terms by the State's witness which would be injurious to the defendant.

Q: Now, when you say there were twenty-five to fifty theatres, tell the Court and Jury what you meant?

A: Well, I was referring to the skin flicks, the term that we use—

Mr. Deitch: Objection, your Honor, to the characterization of skin flicks.

THE COURT: I'm going to sustain the objection for the reason that Mr. Brown has already answered the question on cross examination. He stated that there were twenty-five or thirty, and then when he asked him about adult, using the term adult theatres, he stated, I think he said eight or more. Said he wouldn't be too specific on it. Now why do you want to get into it further? What do you want to ask that question again for, Mr. Moran?

MR. MORAN: Your Honor, I was listening to something else. I withdraw the question.

THE COURT: Now, the term skin flick, I don't know what that is. I don't know that that has any relevency in this case. It could be only a characterization someone uses. I don't know what characterization they use to make it sound good, or what you use to make it sound bad.

MR. MORAN: Yes, your honor.

THE COURT: Let's shy away from that and let the Jury be the determining factor.

Counsel complains he was hampered in his defense by the judges' rulings, however, the court has a duty to

> "control, in furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto." Ga. Code Ann. 24-104 (4).

Counsel in some instances was "playing it close to the line" and the trial judge would not permit it. An example was when the State offered to stipulate that

defendant's expert was a qualified clinical psychologist—in the face of a clear offer to stipulate, the defense counsel in the presence of the jury tried to misconstrue the State's offer and put something before the jury that was not there. The court stepped in to correct the situation and counsel now says such actions are error. Such matters are in the trial judges discretion and are not error unless abuse is shown. Carr v. Ga. 76 Ga. 592 (1885).

The general rule is "the trial judge has the right to propound a question or a series of questions to any witness for the purpose of developing fully the truth of the case, and the extent to which the examination conducted by the court shall go is a matter within his discretion. And a lengthy examination by the court of a witness called by either party will not be cause for new trial, even though some of the questions propounded by the court were leading in character, unless the court, during the examination of the witness by himself, expresses or intimates an opinion of the facts of the case, or as to what has or has not been proved, or the examination takes such course as to become argumentative in character." Wilson v. Ga., 229 Ga. 224; 190 S.E. 2d 539 (1972).

Most of the objections made by the trial judge were outside the presence of the jury.

However, the trial judges does not have to send the jury out when arguments of law are argued—it is a matter of sound discretion. Rutledge v. Hudson, 80 Ga. 266; 53 S.E. 93 (1887).

At one point in the trial, counsel attempted to put the Redrup argument before the jury—"unwilling adults" and was cut off by the court. He complains that

this is not fair. Defendant's idea of a fair trial seems to be that the defense can do anything, commit any error and argue anything so long as it is in his favor to do so without being stopped by the trial judge.

Defendant's expert witness is a prime example of the type of activity the trial judge had to control. Any trial court who has tried obscenity cases has had the same problem. These "experts" are not witnesses but paid advocates who are never responsive to questions but try to argue their position. *See* Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973) where it was said:

> "Indeed, the expert witness practices employed in these obscenity cases have often made a mockery out of the otherwise sound concept of expert testimony. Paris Adult Theatre v. Slaton, 413 U.S. 49 N6." *See Also* U.S. v. Groner, 479 F. 2d 577 (5th Cir. 1973).

An example of the expert attempting to go too far can be found in this case. Defense counsel asks the expert—have you read certain studies etc. He answered yes, and starts to go further. This court stops the witness and asks him—"please wait until he (defense counsel) asks you another question. If you go beyond that it opens the door to objections and wrangling here." From this statement of the trial judge, counsel attempts to say that the trial judge was "admonishing the witness for attempting wrangling," such assertions are absurd. At one point in the trial the witness was admonished to be responsive and the State was admonished to make objections promptly—a duty imposed on the trial judge under cases previously cited. At one point the witness even made the remark to the judge, "do I get a chance to answer this question?" After the State had objected to a previous answer and was sus-

tained. The judge had to send the jury out and admonish the witness. This is just another example of what courts in general and this trial court in particular have to contend with when these types of witnesses are used in obscenity cases. In the face of such activity the trial judge handled both counsel and witness with the utmost dignity and fairness and at every instance attempted to preserve all objections so that they may be properly reviewed. "The judge should always interpose whenever he sees that the law is about to be violated or a grave injustice is about to be accomplished.

3. THE COURT DID NOT ERR IN FAILING TO SUPPRESS STATEMENTS BY THE DEFENDANT THAT HE WAS THE MANAGER OF THE THEATRE.

Miranda warnings apply only to in-custody interrogations. Miranda v. Arizona, 384 U.S. 436 (1966).

The investigator testified that after going to the theatre armed with a warrant, he approached the defendant and without saying anything more asked him who was the manager. When the defendant answered that he was, he was served with the warrant and arrested. No *Miranda* warnings were given before the question was asked. However, it was important to realize that several persons other than the defendant were present before the defendant was asked who the manager was and also the investigator was going to arrest employees—he needed to determine who were employees before he could arrest anyone. Defendant argues that an officer cannot ask for identity before he arrests someone without giving Miranda warnings. It is important that the defendant at this stage was not

accused—the officer had to investigate in order to determine if the persons in the lobby worked at the theatre and therefore were the persons he was seeking to arrest, Carnes v. Ga., 115 Ga. App. 387; 154 S.E. 2d 781, cert. den. 389 U.S. 928 (1967).

People v. Jackson, 195 N.W. 2d 312; 37 McA 728 (1972) held that officers arriving on the scene and asking "what happened" did not violate *Miranda*. Here we have the same situation. It is important to note that the defendant was not in custody in the traditional sense. The investigation had only focused on several people in the lobby—there was no back room interrogation that occured in *Miranda*.

There is no evidence that the defendant was restrained in any manner nor that the question "who is the manager" was specifically aimed at the defendant.

In U.S. v. Leal, 460 F. 2d 385 (9th Cir. 1972) it was held that there is no *Miranda* warning required where one is legally stopped and asked to identify himself.

If defendants argument was correct it would be impossible to serve a warrant without giving *Miranda* warnings to anyone on the premises where the illegal activity occured.

The investigator's question was in effect the same as "I would like to see the manager." He was simply trying to find the person in charge and arrest him. The defendant was not "in-custody" until his identity was determined.

In the case of Brown v. Texas, 437 S.W. 2d 828 cert. den. 393 U.S. 1089 (1968) police officers executed a search warrant authorizing a search of defendants drug store and further authorized the arrest of defendant in

event of discovering narcotics. When the officers found a brown paper bag under the display case, and in the presence of two clerks and a clean-up boy, asked the defendant, "what is this?" The defendant replied "it is heroin, you have got me this time." Affirming the conviction the court held that the defendant had not been under arrest until his admission and that *Miranda* could not be interpreted to exclude res gestae.

4. THE COURT DID NOT ERR IN FAILING TO SUPPRESS THE EVIDENCE AS THE SEARCH WARRANTS WERE CONSTITUTIONALLY SUFFICIENT TO ALLOW THE MAGISTRATE TO FOCUS SEARCHINGLY ON THE QUESTION OF OBSCENITY.

The affidavit of the investigator dated October 24, 1973, sets out the various sexual acts performed in the films and they say "such acts as above consume the entire playing time of the film. This movie is hard core pornography." The investigator's second affidavit sets forth more detail but essentially sets forth the sex acts and then goes on to say that they take up the entire film.

The test for the sufficiency of a search warrant in this area is whether enough facts are before the magistrate to allow him to focus searchingly on the question of obscenity—here ample facts were set forth in the affidavits . . . scenes depicting acts described in *Miller* by way of illustration (i.e. depictions of ultimate sex acts actual or perverted) being distributed at a named place and time and the information less than twenty four hours old.

Unlike cases cited by the petitioner, there was much

more than the mere conclusion of the police officer that the material was obscene. *See* Roaden v. Ky., 413 U.S. 496 (1973) where the affidavit of the officer simply stated that the film was obscene. *Factual* affidavits of police officers are proper vehicles for the issuing of warrants in obscenity cases. Roaden v. Ky., 413 U.S. 496 (1973); Heller v. N.Y. 413 U.S. 483 (1973); Crecelius v. Commonwealth, 502 S.W. 2d 89 (1973).

Defendant complains that the affidavits set out only the sexual conduct in the film. However, as anyone who has seen the film knows, there is no other activity portrayed other than sexual activity.

5. ACCUSING THE DEFENDANT IN TWO COUNTS, ALLEGING THAT THE DATE IS AN ESSENTIAL AVERMENT DID NOT AMOUNT TO SUBJECTING THE DEFENDANT TO MULTIPLE PROSECUTIONS FOR THE SAME OFFENSE.

This court has held that there could be multiple prosecutions of continuous criminal acts where each act is a separate and distinct act although identical crime. Ebeleing v. Morgan, 237 U.S. 625 (1915) and, Georgia follows the same rule. Bloodworth v. State, 128 Ga. App. 657, 197 S.E. 2d 423 (1973); Martin v. State, 73 Ga. App. 573, 37 S.E. 2d 411 (1946).

Anyone who "exhibits" to "any person" obscene material is guilty of violating Ga. Code Ann. 26-2101. The crime is complete when the material is exhibited. Of course, it has always been held that the state cannot charge multiple offenses involving the same conduct unless each instance of the conduct complained of constitutes a complete crime. Estes v. Ga. 98 Ga. App. 521

106 S.E. 2d 405 (1958). In *Estes*, the defendant was charged with nine counts of carrying on a lottery on specific dates. However, the State failed to prove nine separate lotteries—they had to show nine separate prizes. Why?—because a lottery is a continuing transaction until the prize is awarded—there must be chance, consideration and prize. However, to distribute obscene materials, once the material is exhibited to any person the crime is complete. The material can be exhibited to any number of people any number of times. If the argument of defendant was correct a person could schedule multiple exhibitions of an obscene film and if arrested, tried and convicted, still show the material with immunity until his regular scheduling was completed. In fact the defendant continued to exhibit the film after he was arrested and after he was bound over for trial.

As was said by this Court in Steele v. Ga. 227 Ga. 653, 182 S.E. 2d 439 (1971):

> "In this case the State had the option of putting the defendant on trial for instance of malpractice in office because all of the essential elements would appear as to that offense, or put the defendant on trial for as many instances of the offense as it appeared he participated in over a period of time."

Here defendant participated in numerous separate exhibitions of the film to many persons over a period of time.

First Amendment rights deserve strong protection, but in this instance the defendant was put on notice through a commitment hearing that at least probable cause existed to believe that the film was not within the realm of protected expression.

Here the judiciary had acted so that the defendant's first amendment rights were not suspended by the second arrest upon the mere conclusions of a law enforcement official. See Roaden v. Ky., 413 U.S. 496 (1973); Heller v. N.Y., 413 U.S. 483 (1973).

The defendant, in the face of this initial judicial determination returned to the theatre and commenced to participate in the exhibition of a second print of the same film. Defendant acted at his own risk and should be stopped from claiming double jeopardy. *See* Crocelius v. Commonwealth, 502 S.W. 2d 89 (1973).

CONCLUSION

For the foregoing reasons, the instant case does not conflict with the applicable decisions of this Court nor decide substantial federal questions of nationwide import.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States in good standing, and that I have this day deposited in the United States Post Office, Atlanta, Georgia, three (3) copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari with first class postage pre-paid addressed to Robert Eugene Smith, Esquire and Gilbert H. Dietch, Esquire 2005-100 Colony Square, Atlanta, Georgia 30361, counsel of record for Petitioner.

This the _____ day of _____, 1975.

/s/ _____

THOMAS R. MORAN
Assistant Solicitor General
Atlanta Judicial Circuit
160 Pryor Street, S. W.
Atlanta, Georgia 30303

APPENDIX "A"

24-104. (4644) Powers of courts enumerated.—Every court has power—

1. To preserve and enforce order in its immediate presence, and as near thereto as is necessary to prevent interruption, disturbance, or hindrance to its proceedings.

2. To enforce order before a person or body empowered to conduct a judicial investigation under its authority.

3. To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding therein.

4. To control, in furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto.

5. To administer oaths in an action or proceeding pending therein, and in all other cases, when it may be necessary in the exercise of its powers and duties.

6. To amend and control its processes and orders, so as to make them conformable to law and justice; and to amend its own records, so as to make them conform to the truth.